

# Lease Provisions to Explore Amid COVID-19

## Your Tenants

As the pandemic, COVID-19, affects economic and legislative activity and government intervention persists, landlords and tenants are facing unprecedented challenges. Due to the virus' impact, tenants may struggle to occupy space and pay rent in the upcoming months. We would like to make you aware of a few clauses that tenants may explore as possible options to withhold rent, seek abatement or terminate their lease.

We believe landlords should consider keeping meticulous records of any issues related to COVID-19 including complete or partial loss of use for tenants (noting dates, duration and cause of closure) and actual or potential exposure to COVID-19 within the building (stating cause of closure, dates of discovery, notice and closure and any remedial actions taken). Such documentation may prove helpful during discussions with tenants, and in connection with any filing of insurance or legal claims.

These concerns are lease and fact-specific and are also subject to interpretation under individual state law and certain federal laws; and as such, consulting with your attorneys, insurers, tax consultants, risk managers and other advisors will help you to best understand and protect your rights.

## Exploring Your Options

As tenants begin to explore the possibility of relief under their lease, you should consult with your legal and risk advisors to assess if the current lease contains provisions that may delay or excuse performance and/or payment such as force majeure, interruption of service or denial of access.

In addition to rights under the lease, a tenant will most likely review their insurance policy to explore what coverages might apply:

### **I. Force majeure or Impossibility of performance.**

These are similar concepts that may provide for the excuse or suspension of the performance of contractual obligations due to an intervening event which makes performance impossible or impracticable. Many leases expressly exclude financial obligations from these provisions, meaning that the parties will have a continuing, uninterrupted obligation to make payments such as rent; maintain insurance; fund allowances; and other agreed sums as and when due in accordance with the lease.

**II. Interruption of services.** This provision may entitle a tenant to a rental abatement or a right to terminate the lease in the event that the landlord fails to provide certain required services or facilities in accordance with the lease. If a rental abatement is provided for, there are often protective carve-outs for landlords, such as interruptions caused by force majeure or other events beyond the landlord's reasonable control.

The scope may be limited to the landlord's obligation to provide certain essential services such as utilities or, in a more broad construction, extend to the provision of

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access to the building and premises. The rental abatement might only attach after a certain period following notice to the landlord of the qualifying interruption and usually continues until the service is restored. Termination rights, if included, may afford the landlord a longer period to cure the default.

**III. Business interruption insurance.** In general terms, business interruption coverage is an add-on to a commercial policy that protects a tenant against economic losses (such as lost income, operating costs, and the cost of temporary space) due to physical damage of insured property (such as following a fire or other casualty).

The potential applicability of business interruption insurance to losses arising from COVID-19 may well be one of the most scrutinized areas in the days ahead, involving careful parsing of individual policy language, intense debate not only over the economic costs and benefits of such an interpretation and the ramifications for future insurance contracts, but also with respect to constitutional concerns over state interference in private contracts.

**IV. SNDAs/recognition agreements.** With the co-working industry facing headwinds, tenants who are located in co-working spaces may be reviewing any available protections they have to remain in place (or to enter a direct lease) should their landlord, the co-working firm, default.

**V. Operating costs.** The building cleaning and sanitation costs resulting from COVID-19 are likely to be significant, and indeed may remain elevated as cleaning standards and requirements are reviewed and reshaped going forward. Tenants will be reviewing both the lease structure (net vs. base year) and the definition of operating costs, to ensure any pass-throughs are appropriate and correctly allocated.

**VI. Abandonment/continuous use.** Abandonment and continuous use clauses stipulate that the tenant must not abandon or vacate the premises during the term, or require the tenant to operate continuously in the space throughout the term.

A lease may define what constitutes abandonment (for example, a tenant's failure to operate in the premises for a 30-day period, coupled with failure to pay rent and insure), while other times, the language is far less clear. Continuous use clauses may specify certain days and hours in which the tenant is required to operate.

**VII. Security deposit.** It may be helpful to review the specific conditions under which you, the landlord, is entitled to draw down on a security deposit and time periods for cure.

**VIII. Holdover.** It may be helpful to review the specific conditions which trigger a holdover, whether there is any holdover as-of-right, and potential liability for penalty-rate rent and damages.

**IX. Default.** It may be helpful to review the specific conditions which trigger an event of default, including monetary non-performance, abandonment or failure of continuous use and time periods for cure.

**X. Termination/contraction options.** The lease may provide for as-of-right options to terminate early or reduce space.

## Engage Your Real Estate Partner

As always, we are here to work with and for you. While negotiated rent concessions are surely on the minds of tenants, it is important to note that landlords who carry debt service on their buildings would likely need to review the terms of their loan documents, and potentially engage in conversations with their lenders. Finally, we are carefully considering the necessary shape and scope of lease terms for new deals in a post COVID-19 world.

Beyond acting as your trusted real estate advisors, we hope that you and your families, friends and colleagues are feeling and faring well. As we navigate through this period of uncertainty, please know that we at Cushman & Wakefield remain steadfast and ready to help you however we can. We will overcome this challenge together.